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**DEPARTMENT OF TRANSPORTATION**

**[4910-22-P]**

**Federal Highway Administration**

**[FHWA Docket No. FHWA-2011-0122]**

**Revision of Form FHWA-1273**

**AGENCY:** Federal Highway Administration (FHWA), DOT.

**ACTION:** Notice.

**SUMMARY:** This final notice announces the availability of revised form FHWA-1273

– “Required Contract Provisions Federal-Aid Construction Contracts.” This form includes certain contract provisions that are required on all Federal-aid construction projects. Federal-aid recipients must incorporate the revised form in Federal-aid construction projects no later than 45 days after publication of this final notice.

**EFFECTIVE DATE:** The final notice is effective [Insert date 45 days after date of publication in the Federal Register].

**FOR FURTHER INFORMATION CONTACT:** Gerald Yakowenko, Office of Program Administration, (202) 366-1562, [gerald.yakowenko@dot.gov](mailto:gerald.yakowenko@dot.gov) or Michael Harkins, Office of the Chief Counsel, (202) 366-4928, [michael.harkins@dot.gov](mailto:michael.harkins@dot.gov). Office hours for the FHWA are from 8:00 a.m. to 4:30 p.m., e.t., Monday through Friday, except Federal holidays.

**SUPPLEMENTARY INFORMATION:**

**Electronic Access**

This document may be viewed online through the Federal eRulemaking portal at: <http://www.regulations.gov>. Electronic submission and retrieval help and guidelines are available on the Web site. It is available 24 hours each day, 366 days this year. Please

follow the instructions. An electronic copy of this document may also be downloaded from the Office of the Federal Register's home page at: <http://www.archives.gov/federal-register> and the Government Printing Office's Web page at: <http://www.gpo.gov/fdsys>.

## **Background**

On January 31, 2012, at 77 FR 4880, FHWA published a notice and request for comments regarding FHWA's proposal to revise form FHWA-1273. As provided in 23 CFR 633.103, form FHWA-1273 includes contract provisions and proposal notices that are required by regulations promulgated by the FHWA or other Federal agencies. The provisions include non-discrimination, prevailing wage rates, subcontracting, job-site safety and other important requirements that must be included in every Federal-aid construction project. According to 23 CFR 633.104(a), FHWA will update the form as regulatory revisions occur. Since form FHWA-1273 was last revised on March 10, 1994, a number of regulatory revisions have occurred that necessitate the revision of the form.

## **Discussion of Comments**

### *I. Summary*

All comments received in response to the notice and request for comments have been considered in adopting this final notice. Comments were received from five representatives of three State departments of transportation (State DOT). The following discussion identifies and summarizes the major comments submitted by the commenters in response to the January 31, 2012, notice, as well as FHWA's response to those comments.

### *II. General Comments*

*Comment:* A representative of the New Jersey DOT indicated that their contracts specifically preclude subcontractors from being a party to the prime contract, and therefore, any direction to a subcontractor is not appropriate. This representative also noted that instructions or directions as to what State agencies must or must not do are not relevant or appropriate for inclusion in contract requirements between the New Jersey DOT and the contractor.

*FHWA Response:* Form FHWA-1273 is a compilation of Federal provisions that are required to be inserted into federally funded contracts and subcontracts. Under 23 CFR 633.102(d), these required contract provisions apply to all work performed on the contract by the prime contractor's own organization and by all of the prime's subcontractors. Pursuant to 23 CFR 633.102(b) and (e), form FHWA-1273 is to be physically incorporated into each Federal-aid highway construction contract and into each subcontract. These regulations were promulgated under lawful authority and are enforceable. Additionally, FHWA did not propose any changes to existing regulations. As such, FHWA cannot accept comments that would require FHWA to amend existing regulations. New Jersey DOT's comments would require FHWA to amend existing regulations.

### *III. Analysis of and Response to Comments by Section*

#### *Section I. General*

The Wyoming DOT recommended that FHWA either mandate the inclusion of the FHWA-1273 in every subcontract agreement, purchase order, and rental agreement, or allow the contractor to reference form FHWA-1273. Also, a representative from the Pennsylvania DOT (PennDOT) recommended that FHWA consider allowing the States to

include form FHWA-1273 in published standard specification documents (e.g. PennDOT Publication 408 Specifications) that become part of every construction contract by reference. This commenter stated that including form FHWA-1273 in the standard specifications publication would make the provisions available at all times for review.

*FHWA Response:* While FHWA appreciates the recommendations to reduce paperwork by allowing the incorporation of form FHWA-1273 by reference, FHWA is not able to comply with this request for several reasons. First, as explained in the January 31 notice, form FHWA-1273 incorporates existing regulatory requirements. As a result, FHWA proposed updates to make the form consistent with existing regulatory requirements. Since FHWA's regulatory policy in 23 CFR 633.102 requires physical incorporation of Form FHWA-1273 in each contract and subcontract, the FHWA would have to amend this requirement through the rulemaking process. Second, the U.S. Department of Labor's (DOL) regulation at 29 CFR 5.5 requires the physical insertion of certain contract provisions in all contracts, which are reflected in form FHWA-1273. Lastly, FHWA is mindful of the burdens associated with excess paperwork. As such, FHWA permits form FHWA-1273 to be incorporated by reference in bid proposals or request for proposal documents, purchase orders, rental agreements and other agreements for supplies or services related to a construction contract. However, Form FHWA-1273 must continue to be physically incorporated into all Federal-aid highway contracts and subcontracts.

## Section II. Nondiscrimination

*Comment 1:* A representative of the PennDOT recommended that the word “qualifiable” be used in addition to the term “qualified” in the first sentence of Section II.4.a.

*FHWA Response 1:* Without a definition of “qualifiable” that adds clarity to this issue, FHWA does not believe that this recommendation improves clarity. The existing phrase, “sources likely to yield qualified minorities and women,” is adequate to convey the intent of this section.

*Comment 2:* The Wyoming DOT recommended moving the language of Section II, 10(a) and inserting it under Section II. 9 as item (c).

*FHWA Response 2:* It is important to keep the Equal Employment Opportunity Responsibilities of Section 9 of Appendix A to Subpart A of 23 CFR 230 separate from the 49 CFR Part 26 provisions and assurances. Therefore, no change is made.

*Comment 3:* The Wyoming DOT recommended that FHWA clarify the requirements of Section II, 11(b) which require the submittal of Form PR-1391-“Federal-aid Highway Construction Contractors Annual EEO Report” each July. It was suggested that FHWA either remove the PR-1391 reporting requirement or require companies to submit one report listing their total company workforce rather than the project-related workforce. The Wyoming DOT stated that this would more accurately reflect the contractor's or subcontractor's actual affirmative action accomplishments and reduce the reporting burden.

*FHWA Response 3:* The information collected through form FHWA-1391 provides a snapshot of the contractor’s project-related workforce during the last payroll period preceding the end of July. Title 23 CFR 230.121(a)(2) requires the submittal of

reports for each covered contract or subcontract under a Federal-aid project. While some Federal agencies that enforce Federal laws for equal employment opportunity (e.g. the DOL Office of Federal Contract Compliance and the Equal Employment Opportunity Commission) have broad authority to collect employment information about a company's workforce, FHWA does not. The FHWA's authority is limited to specific Federal-aid projects. Thus, no change is made to the language in Section II.11.b.

*Comment 4:* A representative of the New Jersey DOT stated that unless there are statutory requirements to comply with the storage requirements noted in Section II. 11, the requirements will not be enforceable after the contract is accepted.

*FHWA Response 4:* The record keeping requirement is a regulatory requirement found in Appendix A, Section 10, to Subpart A of 23 CFR Part 230. As such, the requirement is enforceable. A regulation has the force and effect of law.

*FHWA Modification:* During the final review process of form FHWA-1273, FHWA decided that it is preferable to maintain the existing language in Section II.9 regarding the bases for discrimination. To be consistent with statutory bases for discrimination, in the final version of the form we have removed the proposed use of "anyone" in Section II.9 and restored the original language which provides that "The contractor shall not discriminate on the grounds of race, color, religion, sex, national origin, age or disability in the selection and retention of subcontractors, including procurement of materials and leases of equipment."

#### Section IV. Davis-Bacon and Related Act Provisions

*Comment 1:* The Wyoming DOT commented that Section IV.3 (a), (b) and (c), require the prime contractor to retain, house, and make available payroll documents for a

period of 3 years after the completion of the project and further recommended that it should be the sole responsibility of prime contractors to review, retain, and house payroll documents for their subcontractors and lower-tier subcontractors. The Wyoming DOT stated that State DOTs should not be required to maintain payroll documents since that information would be available upon request if the State found it necessary to perform an audit or investigation.

*FHWA Response 1:* As explained above, form FHWA-1273 incorporates existing regulatory requirements. As a result, FHWA proposed updates to make the form consistent with existing regulatory requirements. The requirement for the contractor to submit a copy of all payrolls to the contracting agency is a DOL regulatory requirement at 29 CFR 5.5(a)(3). The FHWA does not have the authority to modify this requirement and must incorporate the full text of the DOL's contract clauses in form FHWA-1273.

*Comment 2:* A representative of the PennDOT inquired about the removal of the reference to social security numbers in Section IV.3.

*FHWA Response 2:* On December 19, 2008, DOL issued a final rule titled, "Protecting the Privacy of Workers: Labor Standards Provisions Applicable to Contracts Covering Federally Financed and Assisted Construction." This rule revised the DOL's regulatory policy to better protect the personal privacy of laborers and mechanics employed on covered construction contracts. The rule changed the reporting requirements concerning the use of full social security numbers and home addresses on weekly payroll statements provided to contracting agencies. As a result of the rule, payroll statements are only required to include an individually identifying number for each employee (e.g., the last four digits of the employee's social security number).

However, it did not change the requirements in 29 CFR 5.5(a)(3)(i) for contractors to maintain that information on their own payroll records.

#### Section VI. Subletting or Assigning the Contract

*Comment 1:* The Wyoming DOT noted a typographic error in Section VI.2 that incorrectly references Section VII.

*FHWA Response 1:* The correction will be made in the final document.

*Comment 2:* A representative of the Wyoming DOT recommended that Section VI.2 be clarified by stating that the purchase of materials and manufactured products, if done by the prime contractor, will count as part of the minimum 30 percent of work that prime contractors are required to perform with their own organizations.

*FHWA Response 2:* The FHWA believes that the phrase “total original contract price” as used in Section VI.1 and 23 CFR 635.116 provides sufficient clarity as to what is required. Therefore, no changes are made.

#### Section VIII. False Statements Concerning Highway Projects

*Comment:* The Wyoming DOT recommended that the second sentence of paragraph two be clarified to reference form FHWA-1022, which is the False Statements poster required by 23 CFR 635.119. Wyoming also recommended that the phrase, “Notice to all Personnel Engaged on Federal-Aid highway Projects,” be removed.

*FHWA Response:* FHWA agrees with both recommendations. The appropriate revisions will be made in the final document.

#### Section IX and X

*Comment:* A representative of PennDOT noted an inconsistency between references to the submission of bids and the submission of proposals.

*FHWA Response:* FHWA agrees and the final document will be revised to use the terms bids/proposals or bidders/proposers as appropriate.

**Final Form FHWA-1273**

Pursuant to 23 CFR 633.104(a), FHWA has updated form FHWA-1273 to be consistent with existing regulatory requirements. The FHWA published the proposed revised form FHWA-1273 for public comment on January 31, 2012. After considering all the comments, the FHWA has incorporated all appropriate edits into the revised form FHWA-1273. As such, the revised Form FHWA-1273, which can be found at <http://www.fhwa.dot.gov/programadmin/contracts/1273.cfm>, should be used as soon as possible after publication of this notice and no later than [Insert 45 days after publication in the Federal Register].

Authority: 23 U.S.C.315; 23 CFR 633.104(a)

Issued on: June 18, 2012

Victor M. Mendez  
Administrator

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